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GEO-POLITICAL INSIGNIFICANCE, INFORMATION SHARING, AND ECONOMIC SURVIVAL: AN UNOFFICIAL PERSPECTIVE FROM WITHIN THE CARIBBEAN REGION

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“Dearly beloved we are gathered here today to think about this thing called . . . life.” PRINCE AND THE REVOLUTION, LET’S GO CRAZY (Purple Rain 1984)

I. INTRODUCTION

THIS perspective is personal and reflects individual thoughts, including some that have been shared in public fora, which have occupied my mind at one time or another over the last several years. While the ideas here included are not novel and could also be reflective of what can be read elsewhere, the narrow geographic focus of this perspective is the Commonwealth Caribbean region.

The introduction to the song “Let’s Go Crazy,” which has been referenced above, could, without more, appear out of sync. But, the sentiment is indeed well placed, and this perspective will seek to highlight, even if it does not flesh out, some of the things called life considerations that should be borne in mind when new approaches or mechanisms are being implemented elsewhere in the hemisphere, with implications for the Commonwealth Caribbean.

II. CONTEXT

The Commonwealth Caribbean comprises several jurisdictions that are not homogenous in their stages of development, economic dependence models, financial and regulatory systems, population sizes, or governance mechanisms. The region includes, for example, the member states of

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CARICOM,¹ which, but for Montserrat, are independent states, as well as the Overseas Territories (OTs),² including Montserrat, which are still, in substance, colonies of the United Kingdom, albeit called by another name. The GDP of Trinidad and Tobago relies most significantly on oil and natural gas, the Bahamas most significantly on tourism, and the Virgin Islands depends mostly on revenue derived from the financial services sector.

Notwithstanding that the region is not homogenous, without inward foreign investment in one shape or form every economy here would crumble. To this extent, homogeneity can be inferred. This also means that exogenous factors, in particular those affecting how money flows and those relating to the financial regulatory mechanisms that apply elsewhere, have significant implications for the region. Furthermore, over time there has been an established reliance on the fortunes of the U.S. economy, which speaks to another level at which homogeneity can be inferred. For example, notwithstanding that the Virgin Islands is a British OT, its legal tender is the U.S. dollar and its established trading and associated economic relations with the United States are more significant than they are with the United Kingdom.

Insofar as Trinidad and Tobago is concerned, investment in its oil and gas economy, as well as its external market for output, is United States centered. Where tourism is most important, such as in the Bahamas and Barbados, arrivals from the United States dominate, and the product being offered is usually driven by U.S. market conditions. Insofar as cultural industries are concerned, the primary external, and often most lucrative, target market for regional singers and musicians is the United States. And those who target and even become more successful in Europe and elsewhere tend to break internationally through the U.S. market.

Against this background, it may be considered well established that the lives and livelihoods of the peoples of the Commonwealth Caribbean are intricately bound to the United States. Accordingly, as we consider this thing called life in the western hemisphere, it is important to bear in mind that the leadership and active support of the United States are critical to the economies of the region.

Since the beginning of the global financial crises in 2007, there has been a growing tendency, or so it appears, to find fault in business models that enable homeland nationals to include offshore legal arrangements in their development plans. Whether financial planning options are included or

1. The member states of CARICOM are Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago. *CARICOM Member States*, CARIBBEAN COMMUNITY (CARICOM) SECRETARIAT, http://www.caricom.org/jsp/community/member_states.jsp?menu=community (last visited Mar. 1, 2013).

2. The OTs in the Commonwealth Caribbean are Anguilla, the Virgin Islands, the Cayman Islands, Montserrat, and the Turks and Caicos Islands. *See id.*

not, these legal arrangements represent the essence of capitalism, and related offshore corporations enable investor-determined best arrangements for capital formation, market penetration, and risk allocation. At the core, offshore corporations highlight the principle of separate legal personality, and those who undermine these structures and the flexibility they offer are inflicting what could become fatal wounds to the concept of globalization, as well as the lure of the market economy.

While the principle of separate legal personality has evolved over time, as applied in the Commonwealth Caribbean this legal fiction still affirms that individual members of a corporation do not bear joint and several responsibility for its authorized acts or omissions. The principle is well established under company law statutes and has been judicially confirmed since 1897, per *Salomon v. Salomon*.³

In *Salomon*, the court had to determine, in particular, whether the creditors of an insolvent company could recover outstanding debts from its shareholders. At first instance, in the High Court, Vaughan Williams, J. gave judgment for the claimant, Mr. Broderip,⁴ after having determined that the company was Mr. Salomon in another form and that against him there was a right of indemnity. The Court of Appeal confirmed the judgment of Williams, J., albeit on the ground that Mr. Salomon had abused the privileges of incorporation and of limited liability, which Parliament had intended for bona fide shareholders unlike Mr. Salomon, who was a mere puppet. In substance, the Court of Appeal found that the company was a myth and a mere scheme that enabled Mr. Salomon to carry on as before but with limited liability.⁵

The House of Lords, now the U.K. Supreme Court, unanimously overturned the decision of the Court of Appeal, and, in so doing, rejected the argument that the company had been Mr. Salomon's agent. The House of Lords also found that the company was duly constituted and that it was not the function of judges to read into the statute limitations which they considered expedient. In substance, they confirmed that the company was a separate legal person from its shareholders/members.⁶

Since this House of Lords decision, there have been various exceptions to the principle confirmed therein. Courts have, for example, disregarded a company's separate legal personality or lifted the corporate veil where the company has been used as an instrument of fraud or to commit crimes. Nevertheless, *Salomon* is still considered by many to be the most important and time-honored decision in English company law. Furthermore, its core principle has since been a significant facilitative component of the market economy, without which, capitalism, as we now know it, could not exist.

3. *Salomon v. A. Salomon & Co., Ltd.*, [1897] 2 A.C. 22 (H.L.) (appeal taken from Eng.).

4. *Broderip v. Salomon*, [1895] 2 Ch. 323.

5. *Salomon*, [1897] 2 A.C. 22.

6. *Id.*

Unfortunately, in recent years there has been a sustained 'global' push towards greater 'transparency,' which, if unchecked, will put to death the legal personality framework of a statutory limited liability company in the several jurisdictions of the Commonwealth Caribbean. This march of death could also mark the beginning of the end of capital formation and risk allocation under a corporate vehicle as we now know it. If not certain death, the current push will certainly cause an irreversible, and as yet unquantifiable, undermining of the modern company, especially in its appeal to non-national members; and the important market economy function that it has served could be stymied if not lost.

Although it is quite proper to examine the fundamentals of any company, and to then determine whether it is being properly operated in accordance with its governing articles and the relevant laws under which it was established, there will be cause for concern where it appears that there is a more sinister motive at play. In this context, it is instructive that the period of sustained chipping away of the protective layers of the company has corresponded with a period of sustained layering of 'global regulatory requirements' to protect against the possibility of money laundering and terrorism financing.

In principle, money laundering and terrorism financing cannot be supported. As always, however, the devil is in the details, and it goes without saying that the concepts of money laundering and terrorist financing are not always understood in the same way by all persons. Beyond this philosophical debate, it may appear from a cursory glance at the international media, and even some articles that purport to be written from an academic perspective, that these phenomena are, in substance, problems of the developing world and that their continued negative implications are being actively supported by international financial centers. In reality, this perception, where held, is as far from the truth as distance could possibly measure.

In fact, the real statistics would likely show, for example, that more 'dirty money' passes through London and New York each day than through all other international financial centers combined. It is important to recall, for example, that at the time of the BCCI scandal, one of the 'culprits' openly questioned why he was a target. He argued that he had done nothing that is not done in every major international bank every day. His fault, he could have concluded, was to breach the eleventh commandment – thou shall not get caught.

It can be said, without fear of contradiction, that major financial transactions anywhere in the developing world are directed from or supported by mechanisms in the developed world. Therefore, as with arms control, effective policing of money laundering or terrorism financing must be controlled from the developed world. It follows also that any impression given, express or implied, that the developing world, and in particular international financial centers, is the real culprit in the fight against

money laundering and terrorist financing should be rejected without the possibility of serious opposing argument.

On their face, 'global regulatory requirements' do not discriminate against any jurisdiction in preference of others. But it is not easy to justify that such requirements are in fact global in their design, and experience has shown that their implementation and related cost implications are more unfavorable to small jurisdictions and those jurisdictions' small financial institutions. Furthermore, it could appear to an innocent bystander that the 'standards' setting process is unduly influenced by a select group of major jurisdictions, and that their transgressions, even if improperly labeled that way, are more easily forgiven or simply overlooked.

There is no apparent end in sight to the constant layering of Organisation for Economic Co-operation and Development (OECD) influenced regulatory requirements. Worse, no real performance audit of these requirements has ever been conducted. While strong arguments are made by flag-bearers to justify ongoing review and supporting implementation of these requirements, no credible empirical data has ever been presented in their defense. In addition, no analysis has ever been presented to show that the regulations that are being implemented will ever prevent the ills that they have been designed to cure. In fact, the need for constant change is the surest indicator that the process is hit or miss, with miss having been the more common result.

III. GEOPOLITICAL INSIGNIFICANCE

While the Cold War was being 'fought,' the United States was the acknowledged super power in the West and the Soviet Union (USSR) was the acknowledged super power in the so-called Eastern Bloc. Each super power then sought to maintain strategic outposts in the 'backyard' of the other or, at the very least, to ensure that its backyard did not fall prey to the outpost ambitions of the other. Given its geographic location, the Caribbean region was of strategic importance to both super powers. On the one hand, the United States would have considered real or perceived control within the region by the USSR to be interference in its zone of influence and an imminent danger that could not be tolerated. On the other hand, the USSR would have considered having significant socio-economic, political, and military influence in the backyard of the United States as a desirable objective.

For the United States, the risk of danger was exacerbated as Cuba, which had before then been subject to significant direct or indirect U.S. influence, was now ideologically and otherwise aligned to the USSR. To add insult to injury, Cuba was promoting communism and closer association with the Eastern Bloc, some have argued as a surrogate for the USSR, than to the Caribbean region and Latin America more generally. Even if this was not clearly articulated, there was also a period during the Cold War when Caribbean states were required to be either with or

against the United States. If not with the United States, the offending states were considered, by their nationals, to be tending towards communism. This perception, and the fear it induced, was often the subject of intense media debate or scrutiny and even a dint of socialism was often considered to be evidence of communism.

The stakes appear to have been higher than they are today, and this was reflected in the extent to which the super powers were intimately involved in the socio-economic affairs of the region. It does appear, from a cursory examination, that the USSR, through their surrogate Cuba where necessary, gifted more major infrastructure to the region than did the United States.⁷ But it also appears that the trading relations that developed between the United States and the Caribbean, except with Cuba, against which a U.S. trade embargo is still in force, were better sustained over the long term. During the Cold War there was perceived, even if not real, possibility for trade-offs between the USSR and the United States. Now, with the Cold War at an end, the geographic and strategic citing of the Caribbean is not as critical. Consequently, the erstwhile perceived capacity to influence external resource allocation, by reference to geography, has crystallized to naught.

In any event, the era of fundamental socio-political divide on ideological bases has also apparently come to an end. Radical communism is now as good as dead; and rabid capitalism has been tempered over time by elements of socialism. Even corporations, which are at the core of capitalism, have allowed the concept of corporate social responsibility to take root in recent years. It has been shown, for example, that corporations that implement and adhere to corporate social responsibility best practices are generally more appealing to consumers. They also benefit from greater workforce satisfaction, productivity uplifts, and enhanced resilience in tough times.

As the tendency towards ideological neutrality became more prominent so did the relative geopolitical insignificance of the Caribbean region. It is worth noting, for example, that during the last U.S. presidential election campaign the socio-economic wellbeing of the Commonwealth Caribbean appeared to have been of little or no significance to either the now re-elected President Barack Obama or his then challenger Mitt Romney. Furthermore, over the last several years, when the Caribbean has figured in a high-level debate or a significant media blitz, the usual context has been when arguing that the international financial centers within the region have an undermining effect on U.S. tax revenue and on its economy more generally.

Invariably, the arguments supporting death for international financial centers do not sufficiently consider that these centers have, over time, enabled, and still enable, efficient capital formation, offshore market penetration, and risk allocation for the continuing benefit of Western econo-

7. This infrastructure has included an international airport in Grenada and several schools, including the Jose Marti Technical High School in Jamaica.

mies.⁸ In a sense, it is like arguing against reparations for slavery without ascribing net present value to the once thriving slave economy or acknowledging that there is wealth now being enjoyed by some that would not have materialized without the benefit of slavery.

While the reference to slavery is clearly tangential, it nevertheless brings into focus that what was once important can, if vigilance is not observed and genuine concern exhibited, be revised out of importance. Furthermore, when examined in the context of current approaches to the Commonwealth Caribbean more generally, and in relation to their international financial centers in particular, it appears that ongoing significance is but a measure of how well the arrangement in question now serves the needs of those who require or once have it. Memories are often short, and historical value, though important, is usually trumped by knee-jerk or even well-considered responses favoring the here and now.

While the undermining of globalization of financial and related services, insofar as such globalization relies on international financial centers, is being actively promoted in a supposed attempt to protect the economies of developed states, it is instructive that the undermining impact of globalization of sugar and banana production has not been considered as important at the head table. Furthermore, the phasing out of trade and related preferences to the manifest detriment of small Caribbean economies has been met with what appears to be an 'accept and get on with it' attitude from the head table. While this paper will not seek to justify trade preferences, the historical import and what must be considered to have been a conscience-centered mechanism to justify avoidance of reparations cannot be overlooked. In any event, the circumstances under which such preferences were agreed to be phased out, and which effectively hammered the final nail in the sugar and banana coffin, indicate that affected jurisdictions in the Commonwealth Caribbean had very little influence at the head table where the burial order was signed.

In short, the Commonwealth Caribbean is now what it has always been—several dots on a map with limited capacity to influence decision-making, including in relation to decisions that affect the lives and livelihoods of their nationals. Where once there might have been Cold War enhanced capacity to affect external resource allocation, that era has ended. Accordingly, until there is a major shift in global power dynamics, without overly supportive U.S. policies towards the Commonwealth Caribbean, including in relation to how the international financial centers are treated, regional capacity for sustainable development could be frozen at naught or, at best, next to naught.

8. Kerry Anderson, *Why You Should Choose the BVI For Your Fund*, BVI FINANCE (Oct. 2012), <http://www.bviifc.gov.vg/newsletter/2012/article.octchoosebvi.html>.

IV. INFORMATION SHARING AND ECONOMIC SURVIVAL

The business of banking and financial services has always thrived on data capture. In an era where banks and other financial institutions were smaller and more community-oriented, data capture was easy and often driven by personal knowledge. Accordingly, there was no need for sophisticated underlying systems to capture and manage data. But, as institutions became larger and more global in their outlook, as well as in their operations, reliance on personal knowledge for data capture could no longer suffice. Over time, banks and other financial institutions became multinational and had to implement an intricate web of underlying data-driven support systems for effective management and control.

In this new dispensation, there is an inherent risk of cross-jurisdictional contagion from systemic failure in one jurisdiction. In addition, the interconnected operational mechanisms across jurisdictions now make it easier to transfer funds, including illicit gains, from one place to another. In short, the information age has matured, or at the very least tended to mature, the financial sector, and with maturity it has become even more important for gate-keepers to act responsibly and to, where necessary, implement robust management and related systems for data capture and control. Unfortunately, robust could have the appearance of heavy-handedness and worse could, if vigilance is not observed, be discriminatory in substance and effect.

The most well developed systems for data capture and control in the financial sector require that institutions know their customers as well as their customers' customers. KYC, as the industry knows it, and related requirements to profile customers and, where necessary, report upon their 'suspicious' transactions is costly and often generates more data than the supporting underlying analysis systems can manage.

At the industry level, the approach to KYC, and in particular the reporting requirements, cannot be standardized. Even though there may be standard requirements at the jurisdictional level, there are requirement variations across jurisdictions. Implementation relies upon subjective input, which will vary across, and even within, institutions as well as across implementation regimes more generally.

The KYC shortcomings notwithstanding, there is general agreement that data capture, verification of such data, and subsequent analysis is necessary for functional efficiency as well as to assure, more generally, that the financial system is properly serving its intended intermediation purpose. The concern will ordinarily focus on whether what is required is in fact fit for the purpose, and if, in a cost-benefit analysis, such requirements are justified. In this latter regard, much has been said to support the reporting requirement, but little has been done that would, flowing from a credible performance audit, justify that the several additional layers of information that are required from time to time do in fact serve a laudable purpose.

If it is indeed the case, for example, that much of what is provided is incapable of credible analysis, and merely results in information overload, then it could be cynically concluded that the real purpose being served is the creation of jobs for data capture and related service providers. For example, when prohibition of illicit drugs was introduced in the United States during the 1930s it was indicated that prohibition would undermine that industry and cure related social ills within a generation. Since then, the industry has grown and related social ills have multiplied. In the same breath, several feeder or beneficiary industries, such as the illegal arms trade, the cutting agent business, legal support services, and addiction counseling services, have burgeoned in circumstances where the purpose of prohibition has not been and may never be met.

In its role as a 'global standards setting agency,' the Financial Action Task Forum has been involved in an ever-expanding program that often requires urgent, time-consuming, and expensive implementation of anti-money laundering and counter-terrorism measures at a national level. Insofar as the Commonwealth Caribbean is concerned, effective implementation is monitored through the Caribbean Financial Action Task Force (CFATF). The CFATF program generally requires enactment of new domestic legislation, and each jurisdiction is subject to ongoing peer review to assure compliance. Where deficiencies are identified, urgent corrective measures are required, and there is an ultimate threat of black listing for 'recalcitrant' jurisdictions.

Experience has shown that there is unevenness in the peer review mechanism, and, in any event, the threat, and even the action, of black listing is more detrimental to some jurisdictions than it is to others. When measuring the likely impact of black listing, for example, it must surely be concluded that its substantive effect on the United States, which has the reserve currency that most international financial transactions must be settled in and is the world's largest economy, has to be less than it would be for the Virgin Islands, which does not have its own currency but instead uses the U.S. dollar. The Virgin Islands also has a domestic economy that relies primarily on revenue derived from the financial services sector.

From an implementation perspective, it is also clear that the playing field cannot be level. It must always be kept in mind that the essential functions of government are the same in large as well as small jurisdictions. Even the core cost implications related to the implementation of any measure will likely be the same across jurisdictions. Where there are large government bureaucracies, specialization can be developed and there are more hands on deck to undertake critical research and to get the job completed. Insofar as the Commonwealth Caribbean is concerned, while the size of governments could, in some instances, be considered large relative to population size, the institutional frameworks cannot and do not in fact sustain large numbers of specialists, including legislative drafters.

It is not unusual for a government drafting unit in the Commonwealth Caribbean to include just a single legislative drafter, and, in many instances, drafters are available only under externally funded consultancies. Notwithstanding this lacuna, the business of government must continue. At the same time, scarce resources must also be spent to continuously update laws that secure the CFATF and other requirements in circumstances where the real substantive value may simply be to avoid black listing and its negative implications.

In 2009, the United States enacted the Foreign Accounts Tax Compliance Act (FATCA). This law will have extra territorial reach, and, when operational, will require that offshore financial institutions holding accounts for U.S. nationals, whether such accounts are held by individuals or through companies, with balances above a prescribed limit, will have to make specified disclosure to the U.S. authorities. The information provided will then be analyzed for U.S. tax collection purposes. If disclosures are not made in the manner prescribed, or otherwise agreed, the United States retains the right to take such action as they deem appropriate to secure or at least assure that required tax payments have been made. In each case offshore financial institutions will be required to drill down as necessary to ensure that corporations, trusts, and other such devices are not used to avoid U.S. tax liability.

FATCA is now scheduled to become operational by 2014. In the interim, financial institutions will have to undertake a cumbersome, time-consuming, and very expensive system and training overhaul to secure their readiness for compliance. There is a heavy financial burden for implementation, which will, based on Ernst & Young estimates, cost each institution approximately \$30mm. Furthermore, deliberate or even inadvertent failure to provide the required information could cause a recalcitrant financial institution to suffer corporate liability. The cost and related implications could get worse as the United Kingdom is expected to follow with its own version of FATCA, and continental Europe could follow soon thereafter.

Notwithstanding the obvious burden of compliance and that the substantive value to regional jurisdictions may not be easily justified, the ongoing legislative adjustments that are required under 'global regulations' must be implemented. Even where implementation could, for example, offend constitutional provisions and accordingly require fundamental change, the general attitude from outside nations underscores that such impediments are problems of the jurisdiction under review to be addressed without unnecessary delay. The question often asked from within, even if not clearly or forcefully articulated, is: would a similar and perhaps equally heavy-handed approach be applied to every jurisdiction?

In essence, while there is much that could be complained about, this business of life is about survival. Where, as in the case of the Commonwealth Caribbean, there are limited options for sustainable development,

less-than-ideal could appear, and will often be considered, a most viable, in the circumstances, option. As is, staying in the game requires information sharing, which may or may not be on desirable bases. Against this background, whatever steps are necessary, however onerous and unjustified they may be or appear to be, are usually implemented in the interest of economic survival.

V. CLOSING COMMENTS

This thing called life in the Commonwealth Caribbean is an ongoing struggle for survival. The region cannot sustain itself and, in real terms, is at the mercy of exogenous factors, over which it has little or no control. Insofar as the hemispheric balance of power is concerned, it is often said, and experience has shown, that if the United States coughs the region catches a cold.

Given this background, it can be concluded that the economic and related wellbeing of the Commonwealth Caribbean is fragile. Furthermore, given the trading balance of power that the United States wields in this hemisphere and beyond, it is also clear that sustained development here depends, in large measure, on ongoing and concerned U.S. support for the region. Accordingly, as the United States contemplates, implements, or supports any measure, if the best interest of the Commonwealth Caribbean is spared a thought, it will vigilantly advocate on behalf of its hemispheric 'dependents' in the region.

